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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. DEMONTE THOMAS, Defendant.	CASE NO. MA066546 **NOTICE OF MOTION FOR PRETRIAL DISCOVERY (PITCHESS AND BRADY)**; DECLARATION OF STEPHEN R. KAHN DECLARATION OF DEMONTE THOMAS DATE: June 7, 2017 TIME: 8:30 PLACE: A-21

TO: THE PEOPLE OF THE STATE OF CALIFORNIA, THE DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES AND LOS ANGELES COUNTY SHERIFF DEPARTMENT-LANCASTER.

YOU AND EACH OF YOU will please take notice that on the 7th day of June, 2017, at the hour of 8:30 a.m., in Department 21 of the Los Angeles Superior Court-Michael Antonovich Valley Courthouse, the defendant will move for an order directing each of you to make available the materials herein described to defendant's attorney:

(1) All complaints from any and all sources relating to acts of aggressive behavior, violence, excessive force, or attempted violence or excessive, racial bias,

gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probably cause, illegal search/seizure; false arrest, perjury, dishonest, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284, against Detective Daniel Morris, #436075. Defendant specifically requests production of the names, addresses, dates of birth, and telephone numbers of all persons who filed complaints, who may be witnesses, and/or who were interviewed by investigators or other personnel from the **Los Angeles County Sheriff's Department,** the dates and locations of the incidents complained of, as well as the date of the filing of such complaints.

(2) The defendant is entitled to discover any discipline imposed upon the named officers as a result of the investigation of any citizen complaint described in item one.

(3) Any other material which is exculpatory or impeaching within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83. "Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution." (*People v. Coddington* (2000) 23 Cal. 4rh 529, 589, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.13).) The California Supreme Court specifically empowered trial courts to examine police personnel files for *Brady* material which is discoverable without regard to the five year limitation applicable to *Pitchess* discovery. *(City of Los Angeles v. Superior Court (Brandon*) (2001)) 29 Cal.4th 1, *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39,52-56.

(4) The statements of all police officers who are listed as either complainants or witnesses within the meaning of Items 1 and 3 above.

This motion will be based upon this Notice, the Declaration of counsel, attached points and authorities, and such additional evidence and arguments as may be

presented at the hearing.

In *People v Mooc* (2001) 26 Cal.4th 1216, the California Supreme Court set forth procedures which must be followed in every case inn which a trial court conducts an in camera review.

The custodian of records must present the court all "potentially relevant" documents. If the custodian has a question whether a particular document is relevant, it should be presented for the court's review. the trial court must make a record of all documents examined by the court. If the documents are not voluminous, the court can copy them and place them in a confidential file; the court can prepare a list, log or index of all the documents reviewed, or the court may state for the record what documents have been examined.

The custodian of records must be examined under oath and with a court reporter taking down all the questions and answers regarding the documents the custodian has reviewed and presented or chosen not to present to the court. The custodian of records must tell the court for the record what other documents not presented to the court were included in the complete personnel record and why those were deemed irrelevant or otherwise non-responsive to the *Pitchess* motion.

DATED: May 30, 2017

Respectfully Submitted,

LAW OFFICES OF STEPHEN R. KAHN

STEPHEN R. KAHN
Attorney for Defendant

ORDER

IT IS HEREBY ORDERED THAT the foregoing items as set out in the Notice of Motion for pretrial Discovery be delivered to defendant representative in Department L of this Court, on or before the 7th day of July, 2017.

_____
JUDGE OF THE SUPERIOR COURT

DECLARATION OF STEPHEN R. KAHN IN SUPPORT OF MOTION FOR PRETRIAL DISCOVERY

I, STEPHEN R. KAHN, declare and state as follows:

1. I am the attorney of record for the above named defendant.

2. People arrested or detained, attorneys, friends, relatives, as well as police officers, police supervisors, and private citizens, make complaints to police departments concerning law enforcement officers. The complainants make a variety of allegations, including charges that the officers used excessive force, displayed aggressive conduct, or engaged in violence; displayed homosexual bias; displayed bigotry and prejudice, including making racial slurs; fabricated probable cause; planted evidence; covered up the use of excessive force; were biased in a manner affecting the officer's credibility and/or judgment; coerced a confession, falsified a *Miranda* warning, or fabricated a confession or admission; illegally searched or seized a person; and engaged in acts of dishonesty and'/or moral turpitude.

3. Police departments make and keep written, taped, and computerized records of complaints which are made by citizens, and such records are kept in the personnel files or other files maintained by the department. Police departments may assign investigators or other personnel to investigate these complaints. these investigators conduct correspondence with or interview witnesses and other people and make notes, memoranda, and recordings of conversations in connection with their investigations. The investigators prepare and file reports, findings, opinions, and conclusions concerning their investigations. Disciplinary proceedings may be commenced or taken as a result of these complaints and investigations.

4. Police departments keep in their files notes, findings, memoranda, recordings, reports, transcripts, opinions, and conclusions of the investigations

made and of the disciplinary proceedings commenced or taken as a result of those complaints. Those files contain the names, addresses, telephone numbers, and statements of people interviewed during such investigations and during the disciplinary proceedings commenced or taken as the result of such complaints. The files may also contain diagrams, photographs, police reports, audio tapes, video tapes, and an assortment of writings documenting the investigations undertaken in response to a complaint or inquiry.

5. The materials described in the Notice of Motion for Pretrial Discovery are contained in the personnel files of the specified officers and those files are in the possession and control of the named Sheriff's department. The materials contained in these personnel files will not be made available to defendant or counsel except upon order of this court.

6. It is necessary that these materials be made available to the defendant in order to properly prepare this case for motions and trial. The requested discovery is material and relevant to the trial of this case (as well as any motions) and is necessary for the defense preparation for the following reasons.

7. There is information that is discoverable that will support the fact that the photo lineups in Defendant Thomas' case was conducted unethically. I have received information that Detective Morris acted in such a way as to provide information to potential witnesses, and that this information corrupted and influenced these individuals in making any possible identification. I believe that a search of Detective Morris' personnel records will confirm that this is a pattern of behavior that Detective Morris has engaged in previously. I further believe that discovery and review of his records will support this belief.This motion is founded on this belief. Please see Declaration of Demonte Thomas.

8. These materials would be used by the defense to locate witnesses to testify that the officer has a character trait, habit and custom of engaging in misconduct of the type alleged in this case. These witnesses would also testify to

specific instances of misconduct of the type alleged in this case.

9. This evidence would be admissible and relevant to show the officer(s) have a propensity to engage in the alleged misconduct, and that the officer(s) engaged in such misconduct in this case.

10. Evidence that an officer has a habit, or lacks honesty, has a custom to lying is not only relevant to establish that fact. In addition, evidence of an officer's lacking character would be relevant to show that the officer has a habit, character, and custom to engage in misconduct amounting to moral turpitude. An officer who is not honest while on-duty has engaged in morally turpitudinous conduct and may be impeached with that conduct.

11. Such information would also be used by the defense to effectively cross-examine the officer(s) at trial, and for impeachment purposes where appropriate. Additionally, such information would be used by the defense in the discovery of other admissible evidence.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 30th day of May, 2017 at Beverly Hills, California.

STEPHEN R. KAHN, Declarant

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRETRIAL DISCOVERY

I.

THE DEFENDANT IS ENTITLED TO DISCOVERY OF COMPLAINTS AGAINST THE POLICE OFFICERS INVOLVED IN THIS CASE

The California Supreme Court has ruled that the basic principle underlying defense discovery in a criminal case stems from the "fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonable accessible information. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531,535.) *Pitchess* made it clear that 'an accused...may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial'." *(City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74,84.)

These fundamental principles have been applied by the California Supreme Court to allow criminal defendants to discovery police personnel records. (*City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d 74,84.). The Legislature codified these discovery rules (as they relate to police personnel records) in Evidence Code Sections 1043 to 1047. This codification served to expand these principles of discovery as they relate to police personnel records. "We have previously held that the Legislature, in adopting the statutory scheme in question, 'not only reaffirmed but expanded' the principles of criminal discovery articulated but his court in the landmark case of *Pitchess v. Superior Court...." (Ibid.)*

In order to obtain discovery of the type requested in this case, a criminal defendant must first meet the requirements of Evidence Code Section 1043. The threshold showing is, according to the California Supreme Court, "relatively low," *(City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d 74,83.) The Supreme Court has rejected the notion that a defendant must follow the rather strict

requirements of the various civil discovery procedures, noting that such a procedure would run counter to the protections of the Fifth Amendment to the United States Constitution in many instances. (*Pitchess v. Superior Court*, *supra* 11 Cal.3d 531,536.)

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, the California Supreme Court plainly set forth the low showing a defendant must make in order to obtain an in camera review of police personnel records. "We hold that to obtain in-chambers review a defendant need only demonstrate that the scenario of alleged officer misconduct *could or might have occurred*." (*Warrick*, p. 1016, emphasis added). The Supreme Court specifically rejected arguments that the defense had to establish the defense had to establish the defense scenario was "objectively plausible" or that there was a "reasonable probability" the defense version of events occurred. (*Warrick*, pp. 1023-1024) A trial court cannot deny a *Pitchess* motion just because it believes the defense version is unlikely. (*Warrick*, pp. 1025-1026.).

Instead, the Supreme Court held that in order to show good cause, defense counsel's declaration must describe a factual scenario supporting the claimed officer misconduct. Importantly, the Supreme Court ruled that the factual scenario "may consist of a denial of the facts asserted in the police report." (*Warrick*, pp. 1024-1025). In other words, a simple denial is sufficient.

"By denying the factual assertions made in the police report - that he possessed and discarded the cocaine - defendant established 'a reasonable inference that the [reporting] officer may not have been truthful." (*People v. Hustead*, *supra*, 74 Cal.App.4th at p. 418.)" (*Warrick*, p. 1023.).

A defendant does not have to provide corroboration of his or her version of events. (*Warrick*, p. 1025.) A defendant does not have to provide a motive for the alleged officer misconduct. (*Warrick*, p. 1025.)

In order to establish a plausible factual foundation for his or her claim of officer misconduct, a criminal defendant does not have to establish the allegation

is reasonably probable or apparently credible. A trial court hearing a *Pitchess* motion is not tasked with determining whether or not a defendant's allegations are credible or believable. A trial court does not weigh or assess the allegations contained in a *Pitchess* motion and does not determine whether or not they are persuasive. (*Warrick*, p. 1026) The Supreme Court held that "a plausible scenario of officer misconduct is one that might or could have occurred." (*Warrick*, p. 1026.)

If a criminal defendant alleges that the defense to a charge where the police officer is an alleged victim may be self defense, the character of the officer for aggressiveness is placed in issue. Discovery of prior citizen complaints against the officer foe the character trait of excessive force then becomes mandatory. (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531.)

Discovery of police personnel information is not limited to any particular type of case or crime. For example, it has specifically been held that complaints of fabrication of probable cause and planting of evidence are discoverable when it would show that the probable cause was fabricated and the evidence planted in order to cover up the officer's use of excessive force. (*People v. Gill* (1997) 60 Cal.App.4th 743, 750.) Defense counsel's declaration that the officer used excessive force and fabricated the evidence is sufficient to merit discovery. (*Ibid.*)

To be discoverable it is irrelevant whether or not the information sought is or will be admissible in court. It need only be something which will assist the defense in the preparation of the case or which may lead to relevant material. *(Cadena v. Superior Court* (1978) 79 Cal.App.3d 212; *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823.) Evidence that would impeach the officer by undermining his or her credibility is discoverable. (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 59.) Character traits of complaining witnesses for traits relevant to the defense may be shown by specific acts, opinion, or reputation evidence. (Evidence Code. Section 1003.)

Discovery applies to all officers "directly involved in the fracas" regardless of

whether the officer is named in the complaint or information or is considered a "victim." (*Hinojosa v. Superior Court* (1976) 55 Cal.App.3d 692.) It makes no difference whether or not the police agency sustained the complaints or exonerated the officer. The complaints remain discoverable regardless of any action or inaction taken by the police agency. (*People v. Zamora* (1980) 28 Cal.3d 88.)

A criminal defendant is entitled to discover the discipline imposed upon a police officer as a result of citing complaints of misconduct. *(City of San Jose v. Superior Court (Michael B.*)(1993) 5 Cal.4th 47.)

Any claim of privilege requires the imposition of sanctions when the material being sought is relevant to the defense. (*Dell M. v. Superior Court* (1977) 70 Cal.App.3d 782.)

The defendant is not required to show all defenses or to commit to a specific defense. In order to discover information from a police officer's personnel file, a defendant need only show possible defenses. *(Arcelona v. Municipal Court* (1980) 113 Cal.App.3d 523; *Kelvin L v. Superior Court*, *supra,* 62 Cal.App.3d 823.) All a defendant has to do is establish a logical link between the defense proposed and the pending charge and to articulate how the discovery being sought would support such a defense or impeach the officer's version of events. (*Warrick*, P. 1021.)

The defendant is not required to show that the officers used excessive force in this case or that the officers used excessive force in any other case in order to obtain the requested discovery. (*Caldwell v. Municipal Court* (1976) 58 Cal.App.3d 377.)

No personal statement of the intended defense by the defendant is required; an affidavit of counsel of what the defense "may" be (such as the defense may be self-defense) suffices. (*People v. Memro* (1985) 38 Cal.3d 658; *Kelvin L. v. Superior Court*, *supr*a, 62 Cal.App.3d 823.) There is no requirement whatsoever for a personal statement from the defendant. A *Pitchess* affidavit

authored by defense counsel alleging facts showing relevance need not be based upon personal knowledge, and the defense need not show there are any prior complaints to get discovery. (*City of Santa Cruz v. Municipal Court*, *supra,* 49 Cal.3d 74.) A criminal defendant is not required to furnish foundational facts about the information being sought because the defendant is not in a position to know whether the complaints in fact established the custom, habit, intent, motive or plan which is being alleged. (*People v. Memro*, *supra*, 38 Cal.3d 65.) The trial court is not free to simply disregard the defense version of events in favor of the police version and to then deny the motion. (*Brant v. Superior Court* (2003) 108 Cal.App.4th 100.)

In this case, counsel's declaration is specific and detailed. Defendant's declaration was more than sufficient and it would be an abuse of discretion to deny the motion.

II.

EVIDENCE OF A POLICE OFFICER'S MORALLY TURPITUDINOUS MISCONDUCT IS DISCOVERABLE

There can be no doubt that *Pitchess* discovery includes discovery of an officer's morally turpitudinous conduct.

> "[The People] argued at oral argument that *Pitchess* discovery motions are limited solely to issues of officer violence. Such is not the case. In *People v. Memro* (1985) 38 Cal.3d 658, the Supreme Court explained that the statutes governing discovery motions 'do not limit discovery of such records to cases involving altercation between police officer and arrestees, the context of which *Pitchess* arose.' (*Memro, supra*, 38 Cal.3d at p. 679.) Indeed, the Court also noted that 'one legitimate goal of discovery is to obtain information 'for possible use to impeach or cross-examine an adverse witness....' *(Foster v. Superior Court* (1980) 107 Cal.App.3d 218, 227, 165 Cal.Rptr. 701.)' (Id. at p. 677.) Likewise, other

cases have held that *Pitchess* motions are proper for issues relating to credibility. (See *Larry E. v. Superior Court* (1987) 194 Cal.App.3d 25, 28-33, 239 Cal.Rptr. 264 [motion seeking discovery of complaints for 'aggressive behaviour, violence or excessive force, improper police tactics, dishonest and racial or class prejudice' sufficient to require in camera review when minor alleged that he did not use force against the officers, that the officers's [sic] lied about his actions and planted evidence, and the information was relevant to show officers had a motive to lie and could show potential bias which would affect the officer's credibility as a witness]; *Pierre C. v. Superior Court* (1984) 159 Cal.App.3d 1120, 1122--1123, 206 Cal.Rptr. 82 [discovery motion for records pertaining to 'racial prejudice, false arrest, illegal search and seizure, the fabrication of charges and/or evidence, dishonesty and improper tactics....' sufficient because the minor alleged a defense of false arrest and alleged that a substantial issue at trial 'would be the character, habits, customs and credibility of the officers.'].)" (*People v. Hustead* (1999) 74 Cal.App.4th 410, 417.)"

The California Supreme Court has repeatedly held that evidence of conduct amounting to moral turpitude, should it exist, is admissible to help the trier of fact determine whether any given witness is telling the truth or is the kind of person who would subvert the truth-finding process. The Supreme court has never carved out an exception that allows police officers to be able to testify unfettered by prior instances of morally turpitudinous conduct. No witness is allowed to testify in a false aura of veracity.

Because such evidence is admissible at trial, there must also be a mechanism allowing the discovery of this evidence by the defense. Although couched in terms of a prosecutor's duty to disclose evidence favorable to the defense, the Court of Appeal in *People v. Santos* (1994) 30 Cal.App.4th 169, held that Constitutional Due Process requires a defendant be granted discovery of this type of evidence of misconduct involving moral turpitude.

Prior to the enactment of Proposition 8, impeachment with prior non-felony conduct was barred by the Evidence Code. Proposition 8, however, changed that rule. (*People v. Harris* (1989) 47 Cal.3d 1047, 1080-1081.) In *Harris*, the Supreme Court considered the defense claim that "the prosecutor's examination of Sergeant Wachsmuth was improper and the testimony inadmissible insofar as it related to Linicome's reliability as an informant in past cases." (*Id.* at p. 1080.) The court noted the rule barring such prior instances, based on Evidence Code Section 787. The Court held, "We, therefore, agree with the conclusion of the Court of Appeal in *People v. Taylor*, *supra*, 180 Cal.App.3d 622,631, that Section 28(d) effected a pro tanto repeal of Evidence Code Section 790, and find no basis on which to distinguish Evidence Code Sections 786 and 787." (*Id.* at pp. 1081-1082.) The court concluded, "Admission of this evidence of Linicome's past reliability as an informant, and the prosecutor's reference to it in closing argument, therefore, involved neither error nor misconduct." (*Id.* at p. 1083.)

In 1991, the Supreme Court again turned to this issue, addressing the admissibility of conduct by Steele, a prosecution witness, to impeach Steele's testimony. "Hence, statutory rules against impeachment with acts not culminating in a felony conviction and with character traits not bearing directly upon honesty or veracity do not apply. (*People v. Harris* (1989) 47 Cal.3d 1047, 1081-1082; see Evidence Code, Sections 786-788.) Evidence that Steele threatened witnesses suggests he is the type of person who would harm others and subvert the court's truth-finding process for selfish reasons. Both traits are indicative of a morally lax character from which the jury could reasonably infer a readiness to lie." (*People v. Mickle* (1991) 54 Cal.3d 140, 168; citation omitted.)

In 1992, the Supreme Court summarized *Harris* and *Mickle*: "*Harris* and *Mickle*, both *supra*, employed this reasoning to conclude that statutory prohibitions on impeachment with conduct evidence other than felony convictions (see Evidence Code, Sections 787, 788) no longer apply in criminal cases. In *Harris*, we held that section 28(d) renders evidence of prior reliability as a police

informant admissible to attack or support a witness's credibility. (47 Cal.3d at pp. 1080-1082). In *Mickle*, we noted that a jailhouse informant's threats against witnesses in his own case implied dishonesty and moral laxity. Hence, we ruled, the threats were relevant and admissible to impeach him under section 28(d) (54 Cal.3d at p. 168.)" (*People v. Wheeler* (1992) 4 Cal.4th 284, 291-292.)

The Supreme Court in *Wheeler* held that prior acts of misconduct not amounting to a felony may be used to impeach any witness, subject only to the requirements that the conduct relate to moral turpitude and subject to Evidence Code Section 352:

> "The reasoning of *Harris* and *Mickle* clearly governs the use of misdemeanor misconduct for impeachment. By its plain terms, section 28(d) requires the admission in criminal cases of all 'relevant' proffered evidence unless exclusion is allowed or required by an 'existing statutory rule of evidence relating to privilege or hearsay by an 'existing statutory rule of evidence relating to privilege or hearsay or Evidence Code, [sections 352, 782 or 1103,' or by new laws passed by two-thirds of each house of the Legislature. The limitations on impeachment evidence contained in Evidence Code sections 787 and 788 do not fall within any of section 28(d)'s stated exceptions to its general rule that relevant evidence is admissible. It follows that Evidence Code Sections 787 and 788 no longer preclude the introduction of relevant misdemeanor misconduct for impeachment in criminal proceedings." (*People v. Wheeler, supra*, 4 Cal.4th 284,292.)"

Moreover, the Supreme Court concluded that the conduct used to impeach need not even amount to a misdemeanor: "But section 28(d) makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor. Indeed, misdemeanor convictions are subject to a hearsay objection when offered to prove the witness committed the underlying crimes. Thus, impeaching misconduct now may, and sometimes must, be proven

by direct evidence of the acts committed. These acts might not even constitute criminal offenses." (*People v. Wheeler, supra*, 4 Cal.4th 284,297, fn.7; citations and italics omitted.)

The Supreme Court noted, "Of course, the admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude." (*People v. Wheeler, supra*, 4 Cal.4th 284, 296.) The Supreme Court ruled that apart from the relevance requirement of moral turpitude, evidence of past misconduct is limited only by Evidence Code section 352's restrictions. (*Id.* at pp. 295-207.)

In sum, prior instances of dishonest behaviour are admissible to impeach the credibility of testifying police officers. Prior instances of lying are admissible (*People v. Harris, supra*, 47 Cal.3d 1047, 1080-1082); prior instances of threats of force are admissible (*People v. Mickle, supra*, 54 Cal.3d 140, 168), and any prior misconduct amounting to moral turpitude is admissible *(People v. Wheeler, supra*, 4 Cal.4th 284, 295-297) to impeach a testifying witness.

It must be stressed that the Supreme Court did not create only rule for civilian witnesses and a separate rule for police officers. The rule created by the Supreme Court applies to all witnesses: if that witness has engaged in conduct amounting to moral turpitude, that evidence is admissible to impeach the witness, subject only to the strictures of Evidence Code Section 352.

A witness who engages in conduct amounting to moral turpitude is a dishonest person who displays a morally lax character. This is true whether the witness is a gang member who has strongarmed and bullied others or a police officer who uses his or her badge as a shield to engage in improper conduct. The threshold established by the Supreme Court is simply one of relevance. (*People v. Wheeler, supra*, 4 Cal.4th 284, 295-297.)

The information being requested, if obtained by the defense, either would be admissible itself or would lead to the discovery of admissible evidence. thus, the information is discoverable. (*In re Valerie E.* (1975) 50 Cal.App.3d 213.)

Moral turpitude, as defined in *Harris, Wheeler* and *Mickle* is implicated in the police misconduct alleged to have occurred here. As noted above, evidence allegations the officer lied, used excessive force, or committed other acts of moral turpitude are all admissible pursuant to the cited cases. The declaration of counsel establishes good cause and entitles the defendant to discovery of evidence of morally turpitudinous conduct.

III.

A CRIMINAL DEFENDANT IS ENTITLED TO DISCOVER ALL EVIDENCE WHICH HELPS THE DEFENSE CASE AND/OR HURTS THE PROSECUTION CASE.

The prosecutor in a criminal case has the absolute, non-delegable duty to provide the defense with exculpatory information pursuant to the United States Supreme Court's decision in *Brady v. Maryland* (1963) 373 U.S. 83. *Brady* obligations are self-executing and the prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) The *Brady* obligation is neither dependent upon California's *Pitchess* discovery scheme nor limited by it. While *Brady* and *Pitchess* discovery may coexist and are even interrelated, *Pitchess* cannot serve to trump or limit the prosecutor's Constitutionally-based *Brady* obligations.

The California Supreme Court has plainly recognized this court has the ability to examine a police officer's personnel file for *Brady* material. *(City of Los Angeles v. Superior Court (Brandon)), supra*, 29 Cal.4th 1.) In addition, the *Pitchess* five year limitation on discovery does not apply to *Brady* discovery examined by the court. (*Id.*; see also *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 52-56.)

The California Supreme Court has clearly and plainly explained what must be disclosed:

"Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution." (*People v. Coddington* (2000) 23 Cal.4th 529, 589, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.13.)

Brady discovery exists independent of statute. As was stated by the California Supreme Court:

> "The prosecutor's duties of disclosure under the due process clause are *wholly independent* of any statutory scheme of reciprocal discovery. The due process requirements are self-executing and need no statutory support to be effective. Such obligations exist whether or not the state has adopted a reciprocal discovery statute. Furthermore, if a statutory discovery scheme exists, these due process requirements operate outside such a scheme. the prosecutor is obligated to disclose such evidence *voluntarily* whether or not the defendant makes a request for discovery.:
>
> "No statute can limit the foregoing due process rights of criminal defendants, and the new discovery chapter does not attempt to do so. On the contrary, the new discovery chapter contemplates disclosure *outside* the statutory scheme pursuant to constitutional requirements as enunciated in *Brady, supra*, 373 U.S. 83, 83 S.Ct. 1194, and its progeny." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378, emphasis original.)

State statutes establish a peace officer's personnel file is confidential, although this confidentiality is not absolute. This confidentiality, like any other confidentiality, may be pierced when Constitutional concerns require it to be pierced. (See, for example, *Davis v. Alaska* (1974) 415 U.S. 308, state statute shielding a witness' juvenile record pierced to permit the defense to show witness bias; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, due process requires reporter's shield law to give way.)

Here, as recognized by the Supreme Court in *Brandon*, constitutional due process concerns require the production of *Brady* material. The U.S. Supreme

Court did not create a police officer "exception" to *Brady* discovery. Thus, pursuant to United States Constitutional law, as explained by the United States Supreme Court and the California Supreme Court, the limited confidentiality of police officer personnel records can and must be pierced because Federal Due Process requires it.

IV.

STATEMENTS OF POLICE WITNESSES AND COMPLAINANTS SHOULD BE DISCLOSED NOW RATHER THAN FORCING THE DEFENDANT TO ENGAGE IN THE IDLE ACT OF CONTACTING THE OFFICERS ONLY TO HAVE THEM AVOID CONTACT AND REFUSE TO SPEAK TO THE DEFENSE.

Police officers are often listed as witnesses or even complainants in the *Pitchess* discovery provided to the defense. Although the defense has typically treated police witnesses like any civilian witness and attempted to contact the officers in order to obtain their statements, the defense has discovered this procedure is nothing more than an idle act that results in the waste of precious investigator, attorney, and court time. Rather than require this expensive waste of time, the defense requests the court disclose the statements of all police officer witnesses and complainants now.

It is a well-established maxim of jurisdiction that "the law neither does nor require idle acts." (Civ. Code Section 3532.) "Hence if the essence of a requirement has been met, or if its performance would be superfluous, then the law holds that the requirement has been substantially complied with. *(People v. Boone* (1969) 2 Cal.App.3d 503,506.)

The law abhors idle acts, never requires impossibilities, and respects form less than substance. (Civil Code Sections 3531, 3528.) "The law does not require useless acts from litigants as prerequisites to seeking relief from the courts." (*Van Gammeren v. Fresno* (1942) 51 Cal.App.2d 235.)

It is a colossal waste of time to require the defense to seek out police officers for interviews just to be able to come back to the court to say "we've gone through this futile exercise, the police won't talk to us, now can we have the officers' statements." The defendant should not have to perform such an idle act and the police statements should be disclosed now.

V.

A CRIMINAL DEFENDANT IS ENTITLED TO DISCOVER THE STATEMENT HE/SHE GAVE TO THE POLICE WHEN MAKING A COMPLAINT TO THE POLICE ABOUT MISCONDUCT IN THIS CASE AS WELL AS THE DISPOSITION OF THE COMPLAINT.

Disclosure of the statement the defendant gave to the police at the time he made a complaint about the misconduct in this case as well as the disposition of the complaint. (Penal Code Section 832.7, subds. (b) and (e).)

VI.

PENAL CODE SECTION 1054.1 REQUIRES THE PROSECUTION TO DISCLOSE THE STATEMENTS OF THE ARRESTING OFFICERS.

Penal Code Section 1054.1 specifies that the prosecution is required to disclose to the defense the statements of witnesses the prosecution intends to call at trial. This Penal Code section thus mandates that the prosecution turn over the statements of the arresting officers:

> "Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial." (Penal Code Section 1054.1, subd. (f).)

Information that is contained in a police personnel file is normally obtained through a *Pitchess* motion. Here, the police obtained statements about this very case from the involved officers. There is no evidence these statements either are or ever will be placed in any police officer's personnel file. Absent such evidence, the *Pitchess* discovery procedure does not apply. Additionally, *Pitchess* and Evidence Code section 1043 have not been construed so as to prevent a criminal defendant from obtaining statements of the arresting officers about this very case, as opposed to information relating to a complaint of misconduct made by a citizen in some other, unrelated matter. Penal Code section 1054.1 in fact mandates that the prosecution turn over the statements of all witnesses it intends to call and makes no provision to withhold statements such as the ones at issue here.

VII.

DEFENDANT IS ENTITLED TO DISCOVER INFORMATION FROM A BOARD OF RIGHTS OR CIVIL SERVICE HEARING.

All findings, reports, opinions, and transcripts of disciplinary actions or proceedings, sometimes known as Board of Rights or Civil Service Commission hearings, commenced or taken regarding the above named officers by the Investigating Department relating to those officers' use of excessive force.

Police officers may be subject to a Board of Rights or Civil Service Commission hearing. At that hearing evidence relating to violations of department procedures is heard and the board renders a decision of whether or not an officer violated departmental regulations. The evidence taken at the Board of Rights hearing may include testimony from the officer who has been charged with misconduct.

A defendant is also entitled to discover all Board of Rights or Civil Service Commission proceedings initiated against a police officer. These quasi-judicial

administrative proceedings are presumptively open to the public and the final decision of a Board of Rights or Civil Service Commission is considered a public record. (*Bradshaw v. City of Los Angeles* (1990) 221 Cal.App.3d 908.)

DATED: 5/30/2017

Respectfully Submitted,

LAW OFFICES OF STEPHEN R. KAHN

STEPHEN R. KAHN
Attorney for Defendant

DECLARATION OF DEMONTE THOMAS

I, DEMONTE THOMAS, declare and state as follows:

I am the defendant in this matter and I could testify competently and truthfully to each and every fact contained herein.

1. I am informed and believe that there is information that is discoverable that will support the fact that the photo lineups in my case were conducted unethically. I have received information that Detective Morris acted in such a way as to provide information to potential witnesses, and that this information corrupted and influenced these individuals in making any possible identification. I believe that a search of Detective Morris' personnel records will confirm that this is a pattern of behavior that Detective Morris has engaged in previously. I further believe that discovery and review of his records will support this belief.

I declare, under penalty of perjury that the foregoing is true and correct.

Executed this _nd day of May, 2017, at _____, California.

Demonte Thomas

_____

DEMONTE THOMAS, Declarant

PROOF OF SERVICE

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

I am employed in the County of Los Angeles, State of California. I, the undersigned declare that I am over 18 years of age and not a party to the within entitled action; my business address is 433 North Camden Drive, Suite 888, Beverly Hills, California 90210. On the date set forth below, I served the attached document described as **MOTION FOR PRETRIAL DISCOVERY (PITCHESS AND BRADY) DECLARATION OF STEPHEN KAHN; DECLARATION OF DEMONTE THOMAS IN SUPPORT THEREOF** on the attorneys of record and Judge in this action by placing a true copy thereof in a sealed enveloped addressed as follows:

Attn: Amber-Clerk A-21
Department 21
Michael Antonovich Antelope Valley Courthouse
42011 4th Street West
Lancaster, CA 93534
Fax: 661-524-2250

Louie Morin
Deputy District Attorney
42011 4th St W # 3530
Lancaster, CA 93534
Email: lmorin@da.lacounty.gov
Fax: 661-942-5173

Sheriff's Discovery Unit
4900 Eastern Avenue
2nd Floor
Commerce, CA. 90040

Discovery Unit of Risk Management Group
201 N. Los Angeles St., #301
Los Angeles, CA. 90012

(X) (BY MAIL I am readily familiar with the firm's practice of collection and processing correspondence for mailing. I mailed said documents with postage thereon fully prepaid at Beverly Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

(X) BY FAX **I also faxed to the Clerk in Dept 21 at the above captioned fax number.**

(X) BY EMAIL **I also emailed to Louie Morin a copy the Motion to** : lmorin@da.lacounty.gov

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

EXECUTED this 30TH day of May, 2017 at Beverly Hills, California.

Claudia Hirsch